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# Report of the International Law Commission on the work of its fifty-sixth session (2004)

## Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session, prepared by the Secretariat

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# Introduction

1. At its fifty-ninth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 17 September 2004, to include in its agenda the item entitled "Report of the International Law Commission on the work of its fifty-sixth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 17th to 26th meetings, on 1, 2, 3, 5, 8, 9 and 17 November 2004. The Chairman of the International Law Commission at its fifty-sixth session introduced the report of the Commission: chapters I to IV, VII and XI at the 17th meeting, on 1 November; chapters V and VI at the 21st meeting, on 5 November; and chapters VIII to X at the 23rd meeting, on 8 November. At the 26th meeting, on 17 November 2004, the Sixth Committee adopted draft resolution A/C.6/59/L.23, entitled "Report of the International Law Commission on the work of its fifty-sixth session". The draft resolution was adopted by the General Assembly at its 65th plenary meeting, on 2 December 2004, as resolution 59/41.

3. By paragraph 20 of resolution 59/41, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the fifty-ninth session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of eight sections: A. Responsibility of international organizations; B. Shared natural resources; C. Unilateral acts of States; D. Reservations to treaties; E. Fragmentation of international law: difficulties arising from the diversification and expansion of international law; F. Diplomatic protection; G. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary hazardous activities; and H. Other decisions and conclusions of the Commission.

# Topical summary

## A. Responsibility of international organizations

### 1. General remarks

5. The progress on the topic, notably the adoption of seven draft articles, was welcomed. The Commission's work was considered to be of great practical significance since there was little jurisprudence offering guidance on the subject. The diversity of international organizations in terms of their structure, legal status, membership, functions and competences was identified as a key challenge in drafting a coherent, standard set of rules or guiding principles.

6. Attention was drawn to the importance of involving international organizations in the Commission's work and focusing on their practice as the practical framework for the work. It was considered important to take account of the special characteristics of the European Community, such as the transfer by member States of some of their competences to the organization under its founding treaties as well as the organization's reliance on the authorities of its member States to apply and

enforce its acts and regulations. It was suggested that more organizations should be encouraged to provide information. The Commission was advised not to rely too heavily on unpublished or internal memorandums of organs of international organizations as indicating established practices.

7. The Commission's decision to model the draft articles on responsibility of international organizations after the draft articles on responsibility of States for internationally wrongful acts was considered appropriate. There were suggestions that the Commission should: (a) consider the State responsibility draft articles only as a starting point for studying the present topic since organizations were subjects of international law which differed from States in several respects, including their greater degree of diversity and the types of relations that could be established between them and their member States; (b) remember the diverse nature of those organizations exemplified by the European Union and the European Community when considering adapting the draft articles on State responsibility to the present topic; and (c) carefully assess the unique considerations relevant to international organizations rather than drafting rules that merely paralleled those on State responsibility. The Commission's decision to model the present draft articles on the State responsibility articles rather than stepping back, taking stock of existing law and practice, and exploring particular problems related to codifying the law of international organizations was also questioned.

### 2. Article 1. Scope of the present draft articles

#### (a) Paragraph 1

8. The view was expressed that the question of the responsibility of organizations established under municipal law and non-governmental organizations should be excluded from the study on responsibility of international organizations.

9. The view was also expressed that adherence to the condition that the act entailing the responsibility of an international organization should be wrongful under international law posed difficulties since it was accepted that States could be held liable for their injurious acts in instances not prohibited by international law and the various legal theories concerning no-fault liability were frequently echoed in the internal laws of many States. That subject had been raised in the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization in connection with the right of a State to compensation for injury arising out of an act or decision of an international organization.

#### (b) Paragraph 2

10. It was suggested that the phrase "of which the State is a member" be added at the end of the paragraph.

### 3. Article 2. Use of terms

11. The following suggestions were made: (a) the term "other entities" should be defined or certain criteria should be specified for the sake of clarity; and (b) the more restrictive wording of article 2, paragraph 1 (i), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations should be used since the reference to "other

entities" constituted a progressive development which was not consonant with international practice.

### 4. Article 3. General principles

#### (a) Paragraph 2

12. The view was expressed that the normal situation envisaged by the provision was that conduct could be attributed to the organization that was the bearer of the obligation. However, the European Community could be considered responsible for the infringement of international obligations because of the conduct of member States. If, for example, the Community had agreed to a certain tariff treatment with third States, the agreement might be breached by customs authorities of member States charged with implementing Community law. The special situation of the European Community could be addressed in the draft articles by special rules of attribution of conduct, so that the actions of organs of member States could be attributed to the organization, by special rules of responsibility, so that responsibility could be attributed to the organization, even if organs of member States were the prime actors of a breach of an obligation borne by the organization, or by a special exception or saving clause for organizations such as the European Community. There was a preference for one of the first two solutions.

#### (b) Attribution of conduct to international organizations

13. The rules on attribution of conduct were considered to be of fundamental significance for successful work on all aspects of the present topic. There was support for the general thrust, the methodology and the formulation of the draft articles on attribution of conduct. Those provisions were said to reflect the practical realities of international organizations, to be sufficiently flexible to take into account the varying functions and structure of such organizations and to provide a helpful consolidation of the general rules on the subject. There was also support for the phased approach to the topic, beginning with criteria for the attribution of conduct; for refraining from formulating exceptions to the rules on attribution of conduct as in the State responsibility articles; for focusing on conduct rather than responsibility and thereby separating the issue of attribution from that of the content and consequences of responsibility; and for excluding the issues addressed in articles 9 and 10 of the articles on State responsibility. Attention was drawn to the remaining question of the circumstances in which conduct attributed to the organization might entail the responsibility of its member States and the need for an explicit provision on dual or multiple attribution. Caution was advised regarding the limited extent to which analogies could appropriately be drawn concerning attribution of responsibility to States in the light of the significant difference in the relationship between an individual and his country of nationality and between an individual and an international organization that employed him.

### 5. Article 4. General rule on attribution of conduct to an international organization

#### (a) Paragraph 1

14. Paragraph 1 was considered to be of particular importance as it established the general rule on attribution of such conduct. There was support for considering the conduct of an organ or agent of an international organization in the performance of

their functions to be deemed an act of that organization, as supported by the advisory opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*.[1] A factual test to ascertain whether an agent was entrusted with the performance of functions of that organization as a means of deciding whether its conduct could be attributed to the organization was considered preferable to the official status test. If the circumstances indicated that an organization had exercised effective control over the conduct in question, the latter should be attributed to the organization, notwithstanding any formal assertion or agreement to the contrary. There were also suggestions: (a) to add the phrase "or omission" after the word "act"; (b) to use "in his or her official capacity" in relation to agents; and (c) to consider deleting the phrase "whatever position the organ or agent holds in respect of the organization" since that position would be defined in the rules of the organization.

**(b) Paragraph 2**

15. There was support for the definition of agent as both broad and specific enough to encompass a variety of international organizations; to cover various categories of natural and legal persons or entities entrusted with the functions of international organizations; and to allow for different situations in which conduct might be attributed to an organization. Attention was drawn to the further clarification of that definition by the exclusion from attribution of private actions of the organ or agent indicated by paragraph 1. Support was expressed for drawing upon the Court's advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* by emphasizing not only the official character of the agent but also the fact that he was a person through whom the organization acted. However, doubts were expressed as to whether the definition of "agent" as a person "through whom the organization acts" was a workable definition in the legal sense since that phrase identified the legal consequences of the attribution of conduct, but did not define the term "agent". It was also suggested that paragraph 2 should be formulated based on the complete definition given by the Court in its advisory opinion as well as article 5 of the articles on State responsibility, as follows: "An 'agent' or 'organ' of an international organization is a person or entity that has been charged by that organization with carrying out, or helping to carry out, one of its functions, provided the agent or organ is acting in that capacity in the particular instance." There was support for moving that definition to article 2 since it had normative implications for the draft articles as a whole.

**(c) Paragraph 3**

16. There was support for the provision. However, it was also suggested that the provision be recast to clarify that the rules of the organization were not the sole means of determining the functions of an organization's organs and agents.

**(d) Paragraph 4**

17. There was support for the definition of "rules of the organization" which was based on and supplemented article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. That definition was considered both broad and specific enough to

[1] *I.C.J. Reports, 1949*, p. 174.

address the different situations in which conduct might be attributed to an organization. However, there were also concerns regarding the clarity of the definition; the departure from the definition contained in the 1986 Vienna Convention; and the need for a case-by-case analysis of the nature of the constituent instruments, decisions and resolutions which differed from one organization to another.

18. The words "decisions" and "resolutions" were considered unnecessary since a single reference to the "acts of the organization" would suffice.

19. There was support for including "other acts taken by the organization" as an invaluable element in determining the functions of organs and agents. However, a question was raised as to whether "other acts taken by the organization", without any further qualification, amounted to rules of the organization. The Commission should explore whether certain conditions were necessary for such acts to constitute the rules of the organization. Attention was drawn to the *North Sea Continental Shelf*[2] *cases*, in which the International Court of Justice had observed that State practice must be both extensive and virtually uniform to constitute a settled practice under customary international law.

20. There was similar support for including "established practice". However, there were also concerns regarding the clarity of that concept and its equivalence to the "decisions, resolutions and other acts taken by the organization". It was suggested that the words "established practice" should be changed to "generally accepted practice" to lessen the emphasis on the time element. It was also suggested that the current wording should be replaced by the following: "For the purpose of the present draft article, 'rules of the organization' means the constituent instruments and other acts taken by the organization in accordance with those instruments".

21. There was support for moving the definition to article 2 on use of terms since it had normative implications for the draft articles as a whole.

### 6. Article 5. Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

22. There was support for the provision as a reflection of the relevant principles on the subject. The effective control test was welcomed as a sensible, appropriate, objective and effective criterion for addressing the question; as deeply rooted in the practice of the United Nations within the framework of peacekeeping operations; and as a guiding principle of the entire concept of responsibility of international organizations. Noting that the commentary envisaged effective control primarily in terms of factual control, it was suggested that effective legal control would be more relevant to the European Community.

23. There was some concern regarding the absence of a definition or common understanding of the "effective control" criterion as well as the extent to which that test would adequately address the breadth of potential situations other than peacekeeping operations. It was suggested that the Commission should consider

[2] *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark*, and *Federal Republic of Germany v. Netherlands*, Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

other types of cooperation between international organizations and States or other international organizations in determining the criteria for attribution. It was also suggested that the Commission should further consider: whether the act of a private person acting under the effective control of an organization entailed the organization's responsibility; limiting the provision to agents of international organizations in the absence of established practice or customary law supporting the possibility of placing an organ of a State at the disposal or under the effective control of an international organization; using the factual test to determine whether the organ or agent had been placed at the disposal of the international organization; adding a criterion relating to the exercise of the functions of the organization taking into account article 6 of the articles on State responsibility; replacing the term "at the disposal of" with "under the effective control of" to avoid confusing the issue of command of the organ or agent with that of effective control over the conduct; formulating two separate provisions to cover, first, attribution of the acts of an organ of a State to an international organization and, second, attribution of the act of an organ of a State to that State; attribution in the case of a joint operation where it was hard to distinguish between areas of effective control; and the less stringent "overall control" test used by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of *Prosecutor v. Dusko Tadic*[3] in contrast to the "effective control" test outlined by the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua*.[4]

### 7. Article 6. Excess of authority or contravention of instructions

24. There was support for the requirement that the organ or agent had acted in that capacity as the core criterion for attributing ultra vires conduct and for excluding acts performed in a private capacity. However, it was considered unfortunate that the commentary dwelt on the distinction between on-duty and off-duty conduct, which confused the test established in the article. There were suggestions that consideration should be given to the validity of the conduct of organs or agents before attributing that conduct to the organization to avoid unjustly attributing conduct that clearly exceeded the authority of the organs or agents, or obviously contravened the instructions of the organization; the provision should expressly state that it dealt with conduct exceeding the competence of the organization, and not just that of the subsidiary organ; and the criterion laid down in draft article 4, paragraph 1, should apply to all conduct to avoid using a different criterion in article 6.

### 8. Article 7. Conduct acknowledged and adopted by an international organization as its own

25. There was support for article 7 as correctly stating that the competence of the international organization was governed by its own rules, focusing on the attribution of responsibility rather than on wrongful conduct, and mirroring, mutatis mutandis, article 11 of the draft articles on State responsibility. However, attention was also drawn to the absence of jurisprudence or practice to support the present article, which contradicted the factual test for attribution. It was suggested that the present article required further consideration in terms of how such a scenario would arise;

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[3] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), 31 January 2000.

[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14.

the policy considerations for and against such a principle; and the relationship between draft article 7 and draft articles 4 and 6. A preference was also expressed for deleting article 7 since an act which was not attributable to an organization under international law could not be attributed to it by other means, including the organization's own will.

9. **Question (a). To what extent should the Commission consider breaches of obligations that an international organization may have towards its member States or its agents in the light of the controversial legal nature of the rules of the organization in relation to international law?**

26. Some delegations supported the Commission's consideration of the subject, which would enhance the legal security in relations between States and international organizations of which they were members. The view was expressed that the rules of an organization formed part of the international legal order since they were based on its constituent instrument, which was an international treaty; a breach of an organization's rules thus entailed the international responsibility of the author like any other breach of an international norm; and a different approach with regard to international organizations would disturb the unified regime on the origin of international obligations. It was suggested that the study should address the legal nature of rules governing relationships between international organizations and their members or agents with a view to ascertaining which rules could be considered as international law. Attention was drawn to the primacy of *lex specialis* in that area. However, it was felt that the law of international organizations could not, in many cases, be defined as a self-contained regime and therefore the law of responsibility would often play at least a subsidiary role in the relations between the organization and its member States. Attention was also drawn to the need to consider the legal consequences of an ultra vires act of an international organization towards its member States as well as the legal consequences of the conduct of member States within the organs of the responsible organization.

27. Other delegations felt that the question required further study, the boundaries of the issue must be clearly defined and there was no immediate need to draft special provisions on it.

28. It was suggested that the violation of the rules of an organization with respect to its agents merited a more nuanced approach, for private persons were not subjects of international law and could not assert the fulfilment of any other international obligations, except for the obligations of other subjects of international law stemming from the rules on the protection of human rights. A distinction should therefore be made between the violation of rules of an organization incorporating such human rights rules and the violation of other rules governing the organization's agents. The violation of those latter rules should constitute the object of a complaint only to the extent and within the mechanisms provided by the organization itself, whereas violation of the former rules should constitute the object of a complaint outside the framework of the organization, in accordance with the procedures of general international law. The Commission should therefore consider only violations in the first category. It was also suggested that the Commission should consider only breaches of international obligations of an international organization to its member States and not its agents since the latter would rather be a matter of internal administrative law.

29. Still other delegations believed that the Commission should not study the question in the context of the present topic since it was difficult to delimit the internal rules of an international organization; there was no international consensus on the legal nature of an organization's rules in relation to international law; variations in the nature and functions of different organizations did not lend themselves to such a study; the issue with respect to agents fell within the purview of international civil service law, which would involve a much more complex task of codification; and it was difficult to distinguish between the responsibility of an international organization vis-à-vis its members alone, whether States or international organizations, and a non-member State, or another international organization. Nevertheless, it was suggested that the general rules identified by the Commission concerning the responsibility of international organizations, particularly in relation to individuals, could apply, mutatis mutandis, to the relationship between an international organization and its agents; an act of an international organization that violated a rule of international law independently of the internal rules of the international organization would be within the scope of the Commission's study; and the implementation of the decisions of an international organization could be a matter both of its internal rules and of general international law.

### 10. Question (b). Could necessity be invoked by an international organization as a circumstance precluding wrongfulness under circumstances similar to those for States?

30. There was support for including such a provision based on article 25 of the articles on State responsibility, even though such cases would rarely occur in practice as in the case of States. The view was expressed that there was no reason to preclude an international organization from invoking the protection of an essential interest to justify failure to comply with an international obligation on the following understandings: (a) it should be subject to the same requirements as those established for States to rule out the indiscriminate use of the concept as a means of justifying other wrongful acts of international organizations; and (b) such an interest could not be defined in the abstract and a priori since all the circumstances of the case had to be taken into account in order to evaluate the "essential" nature of the interest to be protected by failing to comply with a specific international obligation. It was considered impossible to rule out the possibility that an international organization might, at some time, have to rely on necessity as a circumstance precluding wrongfulness, for example in order to prevent damage to the territory of States hosting a nuclear research facility where extremely hazardous research was being undertaken by the organization.

31. That was also considered to be a valid question that merited further study of the cases and practice of organizations to determine: the "essential interests" of an organization, the safeguarding of which should preclude wrongfulness; how the reference to "the only way for the State to safeguard an essential interest against a grave and imminent peril" could be appropriately transposed to an international organization; and whether there was a common understanding of what constituted such a peril to an international organization and whether that notion was even relevant to such entities; when and whether international organizations might be justified in invoking such grounds; and the context in which such a rule might be applicable and the specific principles which might be invoked.

32. There were some doubts and concerns regarding the advisability of extending the concept of necessity to the responsibility of international organizations due to the lack of relevant practice; the difficulty of envisaging the "essential interest" of an international organization that could be protected against a "grave and imminent peril"; and the need for even more exceptional circumstances than those applying to a State since the essential interests of an organization could not be equated with the essential interests of a State. It was felt that any future draft article would be based on purely theoretical grounds given the lack of practice. However, attention was drawn to the circumstances precluding wrongfulness embodied in numerous European Community bilateral cooperation agreements. Such agreements provided for the possibility of adopting safeguard measures, involving a failure to respect the terms of the agreements, if serious disturbances occurred in a sector of economic activity or if difficulties arose that could result in the deterioration of the regional economic situation.

33. The view was also expressed that such a provision was inappropriate for international organizations and should not be included for the following reasons. The international legal concept of the state of necessity was strictly connected with the international position of States and not with that of international organizations. Although in some situations the activities and essential interests of the organization might be threatened by a grave and imminent peril, the position of the organization could not be compared with the position of States, for example, in respect of the consequences of a possible disappearance of the organization. Furthermore, there was no need to strengthen the notion of "absolute necessity" as a circumstance precluding wrongfulness. Invoking the necessity for an international organization to commit internationally wrongful acts in order to safeguard an essential interest against a grave and imminent peril could result in ambiguity and in unprincipled interpretations of the nature and motives of those acts.

### 11. Question (c). Would an international organization be regarded as responsible under international law for the conduct of a member State requested or authorized by the organization which violates an international obligation both of that State and of that organization?

34. Attention was drawn to the importance of considering whether both the State and the international organization were bound by the international obligation in question. The link to a clear obligation which would be violated if the conduct was performed by the organization itself was considered critical. The organization itself, and not only its member States, must be independently bound by the obligation breached in order for the organization to be regarded as responsible under international law. If only the member State had assumed the obligation breached by the measure taken by the organization, the organization could not be held responsible. Similarly, if the State was not bound by the international obligation in question, the international organization would be the only party deemed responsible.

35. Attention was also drawn to the question of whether the authorization by the organization might not in itself be a breach of its obligations. The view was expressed that a distinction should be drawn between the obligation of the international organization and that of the State. Whereas the responsibility of the member State was linked to the attribution of the violating act, the responsibility of the international organization was linked to the attribution of the request to perform the act in question. In that context, the difficult question was whether an

international organization could be held responsible for a request or an authorization in cases where the request or authorization was not prohibited by the international obligation in breach.

36. There were different views as to whether a distinction should be drawn between whether the wrongful conduct of a member State was requested or merely authorized by the international organization. The view was expressed that the organization should be responsible even if the State's wrongful conduct was not specifically requested, but only authorized, by the organization. In that regard, general criteria were identified for determining the responsibility of the international organization in such cases, including the extent to which it contributed to the conduct of the State, was involved in the chain of circumstances that led to the conduct, or exercised direction or effective control with respect to the conduct. It was also suggested that the question could be addressed by using the criterion of effective control, in the sense of "legal" control. If a member State were obligated, pursuant to a resolution of an international organization, to take a certain course of action in breach of international law, then in principle both the organization and the State should bear international responsibility. The degree of their respective responsibility would depend on the degree of legal control exerted. In the case of action taken by a member State at the request of an organization and in breach of international law, the requesting organization bore a relatively higher responsibility due to its generally greater degree of legal control. On the other hand, in the case of State conduct which was in breach of international law and only authorized by an organization, the responsibility of the authorizing organization would be lighter, given the relatively wide latitude the authorized State possessed to determine what action, if any, to take. Attention was drawn to the importance of focusing on the actual situation leading to the act or omission entailing responsibility, as well as the more formal question of whether a resolution used the expression "authorize" or "request", or any other term, including when an organization, through a binding decision, obliged the member State to act.

37. The view was also expressed that a distinction should be drawn between cases in which the international organization requested the wrongful conduct of a member State and those in which it merely authorized such conduct. With regard to the former situation, it was suggested that an international organization should, generally speaking, be responsible for wrongful acts committed by one or more of its member States in compliance with a request on the part of the organization. It was also suggested that the responsibility of the organization would depend on whether the international organization wittingly and specifically requested the wrongful conduct as well as the degree of latitude given the State by the organization's request. It was felt that the organization should be held responsible if compliance with such a request was mandatory for member States under the rules of the organization. For example, when a State acted to implement a measure which it was obliged to implement under the rules of the organization, the organization might be held responsible if the measure violated a rule of international law.

38. The view was further expressed that if the international organization merely authorized the conduct of the State that constituted a breach of their international obligations, the responsibility of each one should be assessed separately. It was remarked that if the wrongful act of a State was not requested, but merely authorized by the organization, it would be necessary to analyse the extent of the organization's participation in the wrongful act before deciding whether it was

responsible for the State's conduct. If the wrongful act had been carried out by the State on its own behalf and on that of the organization with the latter's prior authorization, the organization should be held jointly responsible, but if authorization had been given ex post facto, it would be essential to look at the organization's rules in order to ascertain its relationship with its member States. However, it was also suggested that if a member State's wrongful conduct had been authorized by an international organization, even ex post facto, that would also give rise to the joint responsibility of the organization and the State. It was also remarked that the authorization by international organizations of conduct not under their direction or effective control did not exonerate them from responsibility for the commission of wrongful acts. However, in such cases, the main responsibility rested with the States directly involved in the commission of internationally wrongful acts. Strengthening such rules in the draft articles might promote a more thorough and balanced international legal evaluation of decisions taken on urgent international matters in the framework of international organizations, in particular the decisions of the Security Council. It was further remarked that by authorizing a member State, the organization conferred on it a right to become involved in a situation. In such cases, the authorized State was exercising a right, not an obligation or a duty, to take action. Consequently, its conduct should be considered its own rather than that of the organization. During the past decade there had been a number of cases in which the United Nations Security Council had authorized Member States to take measures in respect of certain situations. In no case had the United Nations been held responsible for actions that a Member State had taken under that authorization. Attention was also drawn to the practice of the European Court of Human Rights relating to the control of acts of States in implementation of European Community law.

39. Attention was drawn to the question of the responsibility of the State in such cases. The view was expressed that both the member State and the international organization should be held responsible under international law. It was felt that the conduct of an organ of a State should remain attributable to that State even if such conduct had taken place on the basis of a decision by an international organization of which the State was a member. It was suggested that the issue of the subsidiary responsibility of member States in the case of responsibility of an international organization, raised by the Commission in the commentary to draft article 1, should be examined within the framework of exceptions to the rule set out in draft article 3, in which responsibility did not presuppose attribution. It was also suggested that the question of the possible exclusion of a State from responsibility should be treated under the law of the international responsibility of States and not included in the current project.

## B. Shared natural resources

### 1. General comments

40. Delegations expressed support for the work of the Commission on the topic and stressed its importance, noting that the Commission's work would help to fill the considerable gap in international law on the subject and would address the widely divergent practice of States. The aim of better protecting transboundary groundwaters efficiently and flexibly through international cooperation and on the basis of rules under international law was emphasized. Despite the paucity of

point of reference for future work. Some delegations welcomed the questionnaire circulated by the Special Rapporteur and expressed the hope that replies to the questionnaire would provide some useful insights. Several delegations noted the intention of their Governments to submit relevant information on their practice in response to the questionnaire.

46. Some delegations provided information on their practice with regard to transboundary groundwater resources. In particular, several delegations highlighted the experience of countries members of MERCOSUR (Common Market of the South) with respect to the management of the Guaraní aquifer. It was observed that at the judicial level, the MERCOSUR countries were working to establish fundamental principles on which to base future regulations and measures relating to the preservation and use of the aquifer. An ad hoc high-level working group on the Guaraní aquifer had been established to draw up a draft agreement among the MERCOSUR member States which would establish the principles and criteria for safeguarding the rights of those States over their groundwater resources. The draft agreement might also include conditions and guidelines for the management and monitoring of the Guaraní aquifer. The negotiations were based on three principles: (a) the portion of the Guaraní aquifer lying in the territory of each State was under its sovereignty and, without prejudice to any cooperation efforts, each member State of MERCOSUR was solely responsible for the management of that portion of the aquifer located in its territory; (b) preservation of the aquifer with a view to its rational and sustainable use; and (c) respect by each State of the obligation to cause no significant harm to the other States. Thus, the MERCOSUR member States took the position that groundwaters belonged to the territorial domain of the States under whose soil they were located and that the Guaraní aquifer system was located in the area comprising MERCOSUR countries. Water resources belonged to the States in which they were located and were subject exclusively to the sovereignty of those States. In that regard, it was considered important to reiterate the principle of sovereignty regarding the use of transboundary resources contained in General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources.

47. It also was noted that although the Guaraní aquifer was one of the largest underground reserves of water in the world, its capacity for renewal was insignificant compared to its total volume and potential uses. That fact required great prudence when establishing the principles for its management. Comprehensive studies of the Guaraní aquifer were under way with a view to ensuring that the members of MERCOSUR adopted appropriate regulations for that purpose. Furthermore, a four-year, World Bank-sponsored technical project on the environmental protection and sustainable development of the Guaraní aquifer was expected to improve understanding of that natural resource.

48. In the light of the evolving practice and ongoing research with respect to the Guaraní aquifer, the Special Rapporteur was urged to use caution in describing that resource. For instance, the Special Rapporteur's statement that the Guaraní aquifer "practically" did not receive recharge or that it was not connected with surface waters was viewed as premature, especially since studies were being conducted to provide further information and better understanding of the aquifer's features, including its recharging areas. It also was suggested that the Special Rapporteur's analysis should be confined to the technical data provided by the States in which the transboundary resources were located, particularly in view of the current four-year project for the environmental protection and integrated sustainable management of

the Guarani aquifer. In addition, it was considered useful for the Guarani aquifer States to provide the Commission with information on the aquifer.

49. Reference was also made to the National Water Act of Mexico which established mechanisms for ensuring better use of water. It was further noted that with regard to transboundary resources other than groundwaters, solutions were often found on a case-by-case basis.

50. Some delegations referred to the lack of relevant State practice noting, for example, that the existing Canada-United States bilateral instruments, such as the Boundary Waters Treaty, did not apply to groundwaters, although the International Joint Commission had conducted studies on groundwater issues. It was also pointed out that in agreements on the protection and use of transboundary watercourses between the Russian Federation and neighbouring States, the question of such groundwaters had not been addressed specifically.

### 3. General framework for formulating draft articles

51. Some delegations welcomed the general framework for formulating draft articles proposed by the Special Rapporteur. Although the proposed framework was considered a good starting point, it was emphasized that the framework would have to evolve as work progressed. While the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses provided the basis upon which to build a groundwater regime, it was stressed that any new legal framework should take fully into account the unique characteristics of groundwaters. Moreover, it was cautioned that the provisions of the current framework that would allocate water resources located in aquifers between States on the basis of similar provisions in the 1997 Convention might prove controversial.

### 4. Scope of the present sub-topic

52. The decision to adopt a step-by-step approach to the study of the topic, with oil and gas to be dealt with subsequently, was noted with approval, given the importance of groundwaters for the daily life of humanity. However, concern was also expressed over the Commission's narrow treatment of the topic as a whole, which had been intended to subsume migratory species and all mineral deposits not within the jurisdiction of a single State.

53. Support was also expressed for not limiting the scope of the draft articles to transboundary groundwaters not covered by the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.[5] It was noted that some of the aquifer systems covered by the 1997 Convention had characteristics of groundwaters and should be governed by a new instrument on that question. However, it was also stressed that more attention should be given to the management and sharing of confined aquifers not covered by the 1997 Convention, taking into account their non-renewable nature.

54. With respect to the relationship between the proposed draft articles and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, it was noted that since transboundary aquifer systems could be connected to surface waters, the question of the relationship between the two

[5] See General Assembly resolution 51/229 of 21 May 1997, annex.

instruments did arise. It was suggested that the issue could be resolved by including specific provisions in the draft articles, or by limiting the scope of the study mainly to "confined underground aquifer systems", with the understanding that "aquifer systems" could be linked to surface waters, but that such a link would be weak and negligible.

55. Support was expressed for the inclusion of a provision on the relationship between the new aquifers regime and the regime under the 1997 Convention, so as to remove any doubts as to the application of the 1997 Convention to aquifers. It was also suggested that compatibility could be assured by the elaboration of a draft protocol additional to the 1997 Convention.

56. It was noted that reliance on the 1997 Convention as a framework for a new regime dealing with groundwaters should be balanced with other approaches, especially since the 1997 Convention was not yet in force and still lacked considerable international support. Such exploration of other approaches could contribute to a consensus on the draft articles. The view was also expressed that it was premature to discuss the question of the relationship between the 1997 Convention and the draft articles, as it would depend very much on the content and the final form that the instrument would take.

### 5. Draft article 1 — Scope of the present Convention

57. Some delegations welcomed draft article 1, setting forth the scope of the draft articles. However, some other delegations asked for more clarity. It was suggested that additional information be requested from technical experts on the viability of limiting the study to "transboundary aquifers".

58. Support was expressed for the Special Rapporteur's suggestion that recharge and discharge areas also be regulated in order to ensure proper aquifer management. It was also suggested that the question of the link between an aquifer system and domestic watercourses and recharge and discharge areas should be studied.

59. With regard to drafting, it was suggested that the word "uses" be retained rather than changed to "exploitation", as had been suggested during the Commission's discussion.

### 6. Draft article 2 — Use of terms

60. There was general support for the Special Rapporteur's proposal to use the terms "aquifer" and "aquifer system", rather than the term "confined transboundary groundwaters".

61. In order to provide comprehensive definitions of "aquifer" and "aquifer system", it was proposed to amend draft article 2 by inserting the phrase "sand, gravel, or soil" after "formation" in paragraph (a), and after "formations," in paragraph (b). If that concept did not include sand and gravel, it would be necessary to consider what rules or principles of international law governed transboundary groundwater systems which were not aquifers. It was also suggested that, in draft article 2 (a), reference should be made to the water contained in the aquifer, rather than limiting the definition to "water-bearing rock formation". Moreover, some delegations questioned the use of the term "exploitable" in draft article 2 (a). In particular, a question was raised regarding the existence of the technical capabilities to "exploit" aquifers. Thus, it was suggested that the word "exploitable" should be

either deleted or defined more precisely. It was also suggested that "exploitable" be replaced by the term "usable", which was a more objective criterion.

### 7. Future draft article 3 — Principles

62. Regarding future draft article 3, on the principles applicable to transboundary aquifers, it was noted that the principles governing the uses of aquifer systems should be analysed with care to ensure that they were appropriate.

63. Some delegations were of the view that the basic principles in the 1997 Convention offered a basis for the elaboration of principles for a groundwater regime. In that regard, some delegations noted that although the 1997 Convention was not directly applicable to the management of some transboundary aquifer systems, the principles applicable to surface waters could be applied to groundwaters, provided they were expanded and adapted to the specific characteristics of the latter. On the other hand, some underground water systems were linked with surface waters, in which case the principles of the Convention would remain relevant.

64. Some other delegations were of the view that the basic principles embodied in the 1997 Convention could not be automatically transposed to cover transboundary aquifer systems. Since the characteristics of most aquifers differed vastly from those of surface waters covered by the 1997 Convention, and since pollution of aquifers might prove particularly difficult to clean up, it was stressed that the principles and rules relating to those aquifers should place greater emphasis on environmental protection and pollution prevention. Moreover, although the 1997 Convention provided the basic principles for guiding the Commission's work, it had so far received little support from States; replication of those principles might therefore be counterproductive. In addition, it was questioned whether the principles in the 1997 Convention should apply to non-renewable underground water resources not within its scope, or whether those resources should be governed by the same regime as governed other depletable shared natural resources, such as oil and gas. The view was expressed that once the scope of the Commission's work had been defined, a special regime would have to be devised for transboundary aquifers which were non-renewable or slow to recharge. It was noted that the Convention on the Protection and Use of Transboundary Watercourses and International Lakes[6] should also be taken into account, even though it was regional in nature, as it established several basic principles for the protection and use of transboundary watercourses regardless of whether they were surface waters or groundwaters.

65. With regard to specific principles to be included in draft article 3, some delegations were of the view that the principle of "equitable use" could appropriately be applied to water resources and should be taken into account by the Commission, bearing in mind the particular characteristics of groundwater resources. However, it was suggested that the term be changed to "equitable exploitation". Support was also expressed for the use of the principle of "reasonable utilization". It was suggested, however, that with respect to transboundary aquifers, equitable and reasonable utilization and participation should be studied in depth, because those resources, unlike surface waters, were non-renewable or slow to recharge. Furthermore, it was considered important to include a reference to the

[6] United Nations, *Treaty Series*, vol. 1936, p. 269.

principle of sustainable use. It was also suggested that the obligation not to cause harm could be incorporated in the part concerning the prevention of pollution and the protection of aquifers. On the other hand, some delegations opposed the inclusion of the principles of equitable use and reasonable utilization. It was observed that the principles of equitable use and reasonable utilization were not easy to apply in relation to an aquifer system that received no recharge and was therefore non-renewable. It was therefore not clear what meaning could be attributed to the concepts in the context of groundwaters. However, consideration might be given to the idea that transboundary aquifers should be utilized at rates commensurate with the ability of the States concerned to ensure alternative water supplies for their people. Moreover, it was noted that since both concepts were embodied in the 1997 Convention, to which many States were not parties, it might prove difficult to insist on their application in the present project.

66. It was further suggested that the Commission first define the general principles applicable to all groundwaters, and then refine the principles governing surface waters that could be adapted to groundwaters, and also develop specific principles for certain types of aquifers, such as those not hydrologically linked to surface waters. It was considered essential that States try to acquire information about the factual nature of "aquifers" which they were using or intended to use and that the need to acquire information should be reflected in the general principles in Part II.

### 8. Draft article 4 — Obligation not to cause harm

67. Some delegations expressed the need for further analysis of the concept of "transboundary harm" in cases where the groundwaters in a given study had special characteristics, such as non-renewable transboundary aquifer systems. It was considered unclear, for example, whether one State's water usage within its territory could be considered as causing transboundary harm if it lowered the volume of water in a shared aquifer system or whether harm could still result when States used the resources of the aquifer system to varying degrees.

68. Some delegations sought clarification on the concept of "significant harm" and on the criteria for determining when "harm" constituted "significant harm". Although the threshold was considered relevant and applicable, it was suggested that what constituted "significant harm" should be judged on a case-by-case basis. Moreover, the view was expressed that, in the context of draft article 4, the term "harm" referred to harm caused to other States, and that the rights and obligations of States relating to activities that might affect transboundary aquifer systems should be emphasized to give prominence to the status of States, without prejudice to the use of resources by specific individuals and groups, which should be governed by domestic measures taken by the State concerned. It was also pointed out that draft article 4 focused on harm caused to aquifer system States and did not pay sufficient regard to the protection of the aquifer and the water contained therein. Moreover, it was also noted that the Commission should proceed with caution in drawing parallels to its work on the draft articles on the prevention of transboundary harm from hazardous activities.

69. With respect to paragraph 3 of the draft article, it was suggested that the word "impair" should be replaced by the word "alter", which would be a clearer and more objective criterion. Some delegations expressed concern over paragraph 4, relating to the consequences of serious harm to a transboundary aquifer State. In that regard,

it was suggested that the use of the words "significant harm" in that paragraph should be carefully considered. Although the reasons given by the Special Rapporteur for using that language were quite convincing, given the extreme vulnerability of the resource, which was not always renewable, the Commission should also consider whether it would be appropriate to use a lower threshold than "significant harm". In addition, reservations were expressed over the treatment of liability in the draft articles, and it was suggested that the question of compensation could be dealt with in connection with the topic "International liability for injurious consequences arising out of acts not prohibited by international law". There was no need to over-regulate liability under the current topic unless harm resulted from a violation of international law. On the other hand, a view was expressed that the draft article should also specify, in the event of irreparable damage to a transboundary aquifer, what type of consequences might be entailed and the conditions on which affected States might claim compensation.

### 9. Draft article 5 — General obligation to cooperate; Draft article 6 — Regular exchange of data and information; and Draft article 7 — Relationship between different kinds of uses

70. With regard to draft articles 5 and 6, concerning, respectively, the general obligation to cooperate and regular exchange of data and information, it was suggested that both articles should contain a reference to the importance of capacity-building in those areas and the need to cooperate and exchange information about matters connected with environmental protection and the sustainable use of aquifers. Cooperation between States was considered essential for the equitable and reasonable utilization of transboundary aquifer systems and should be properly reflected in the draft articles.

71. In relation to draft article 6, a view was expressed that the exchange of certain kinds of data and information might be inappropriate, since such exchange might have adverse implications for the national interest of an aquifer system State. It was therefore proposed that such exchange should be made subject to national interest considerations, including security.

72. With respect to draft article 7, on the relationship between different kinds of uses, it was noted that the proposed draft was in line with the careful compromise reflected in article 10 of the 1997 Convention.

### 10. Final form of the instrument

73. Although it was noted that no decision had yet been made as to the final form of the study on transboundary groundwaters, some delegations were of the view that the work should take the form of recommendations or guidelines, which would assist States in formulating regional and subregional agreements. It was considered that such context-specific arrangements were the best way to address pressures on transboundary groundwaters and give States flexibility to tailor agreements or arrangements to suit their circumstances. Such a solution was also considered preferable because of the widely varying characteristics of transboundary aquifer systems. Moreover, in such a way, the standards which might be elaborated by the Commission could provide a model for regional agreements. A view was also expressed that since preparing, negotiating and implementing a global convention on transboundary groundwaters appropriately in each region would presumably be a

lengthy process, it would be useful to consider an approach in which different "building blocks" were formulated and offered to meet the different regional or technical starting points. That approach, rather than a global convention, would make it possible to reach legally binding regulations more closely geared to specific regional problems and to achieve practical results more quickly and efficiently. The United Nations Environment Programme, given its experience with international legislation in the environmental sphere, could help the Commission in developing that approach. The view was also voiced that, given the vulnerability of aquifers to pollution and excessive exploitation, some specific obligations should be established in future draft articles. Some other delegations were of the view that the decision on the final form should be made at a later stage, after progress had been achieved on substantive matters.

74. Irrespective of the form, it was noted that some norms should be directed at the States in which the resources were situated since those were the States that had a duty to apply and develop them in their mutual relations through regional and subregional agreements. Moreover, the instrument should clearly set out its applicability to transboundary aquifer systems and to the uses or activities which had or were likely to have an impact upon and measures of protection, preservation and management of transboundary aquifer systems.

## C. Unilateral acts of States

75. Several delegations reiterated that they regarded unilateral acts of States as a source of international obligations. They agreed that the next step could be the elaboration of a definition of unilateral acts based on the operative text adopted by the Working Group in 2003 together with the formulation of some general rules for all the unilateral acts and declarations considered by the Special Rapporteur, in the light of State practice, which would promote stability and predictability of relations between States. The Commission should develop a clear definition of unilateral acts of States having a legal effect while, at the same time, ensuring that States enjoyed sufficient flexibility for acts of a political nature. It would be useful to continue examining the evolution of various acts and declarations including aspects relating to the author of the act, their form, their subjective elements, their revocability and validity as well as the reactions of third States. The focus on State practice represented a positive development.

76. Some delegations were of the view that the efforts made to date should not be abandoned. If it was not possible to elaborate a draft convention, the Commission could formulate some guidelines. Other delegations, however, felt that the great variety of unilateral acts and the complexity of the topic made the Commission's task of defining and formulating clear guidelines very difficult. The view was expressed that it was necessary to consider unilateral acts *stricto sensu* and to examine objectively the State's intention to create an obligation. For the purpose of determining what legal obligations stemmed from unilateral acts, the latter had to be defined as acts distinct from any act undertaken within the framework of existing conventions of customary or institutional law.

77. It was stated that, in order to categorize unilateral acts and their legal consequences, a further study of State practice and a clear-cut distinction between the various forms of unilateral acts of States were needed. To that end, States would

have to provide further information. In his future work, the Special Rapporteur should aim to retain the flexibility that was central to the unilateral acts as a means of State conduct. Since general rules could hamper that flexibility, elaboration of general rules applying only to specific forms of unilateral acts, such as acts of recognition, could be a better approach in maintaining the balance between legal certainty and flexibility.

78. Many delegations endorsed the Commission's decision to establish an open-ended working group to study selected cases. On the question of whether political unilateral acts should be covered under the topic, the view was expressed that there was no clear demarcation between legal and political acts; some political acts could still produce legal consequences. One possible breakdown might distinguish acts that contributed to the development of customary rules of international law; acts that created other specific legal obligations; and acts that had other effects under international law. Inevitably there would be some overlaps, but the process of assigning unilateral acts to those categories would provide a better understanding of their nature and import. A typology of that kind would better enable the Special Rapporteur to separate relevant unilateral acts from those that were irrelevant for purposes of the study and to determine where the focus should lie. It was also pointed out that an act might belong to more than one of the generally established categories proposed by the Special Rapporteur and that, therefore, such categorization of acts might not be the most appropriate.

79. It was suggested that, in order to prevent unauthorized unilateral acts of States, there should be some restrictions on who could perform unilateral acts on behalf of States. On procedural issues such as the interpretation, modification, supervision or termination of unilateral acts, provisions could be modelled on those in the Vienna Convention on the Law of Treaties.

80. It was observed that some examples in the report of the Special Rapporteur had been cited as acts of States when the actor was a non-State entity. Such mistakes should be avoided in future reports. Moreover, a number of instances of State practice cited, such as recognition of an organization's official representative or the notification of a State's neutrality, were often misleading.

81. It was stated that Governments might not clearly define the legal nature of their own acts, so that the Commission should take into account not only the objective elements of the acts themselves but also subjective elements such as the intent of the States in question.

82. The view was expressed that the topic was not yet ready for the formulation of draft articles. A number of delegations questioned the suitability of the topic for codification or progressive development. If, however, the Commission decided to continue, even more detailed and careful research might be required. Codification, in any case, would prove extremely complex if not impossible. The main problem would be to produce a definition of unilateral acts that could, in every case, distinguish a unilateral legal act from other unilateral acts giving rise to no legal consequences. To base a definition on a State's intention alone seemed insufficient, since it was extremely subjective. The decision by the International Court of Justice in the *Nuclear Tests*[7] case should not automatically be adopted as a basis for the Commission's work. Much depended on the subject of the unilateral act. If that

[7] *I.C.J. Reports, 1974.*

subject could be clearly defined and was of an explicitly legal nature, such as a unilateral and explicit waiver by a State of a right belonging to it, the act concerned could be considered to be of a legal nature.

83. According to another view, it was currently unclear whether a State's statements, conduct or national legislation constituted unilateral acts, whether such acts had to be in written form or could be oral and whether they had to be formally communicated. There was also uncertainty with regard to the normative status of the concept in international law. It was not clear whether unilateral acts could be regarded as a new source of international law beyond the scope of Article 38, paragraph 1, of the Statute of the International Court of Justice or whether they contributed to the formation of existing sources of international law, including treaties and customs, as demonstrated by the effects of the Truman Proclamation on the Continental Shelf or Norwegian claims for straight baselines on the evolution of the law of the sea.

84. It was noted that, with regard to the criteria for the validity of unilateral acts, the question was whether such acts could, as in the case of international treaties, deviate from the residual rules of international law. As for the necessary conditions for the modification or withdrawal of a unilateral obligation assumed by a State, it was doubtful whether a direct analogy with treaties — in relation, for example, to the "threshold" for the implementation of a rule on a fundamental change of circumstances as grounds for terminating an obligation — could be justified.

## D. Reservations to treaties

### 1. Definition of objections

85. Several delegations commented on the definition of objections to reservations. It was stated that it was difficult to define objections to reservations by their effects before undertaking substantive work on the effects of reservations. The current definition did not fully convey the contractual nature of the process of making reservations and objections; consequently, it could be used as a working draft and revised, if necessary, at a later stage. It was pointed out that a definition would avoid the possibility of an objecting State causing its objection to have inappropriate effects. It was also useful to make a distinction between an objection, as such, and mere comments on or interpretations of a reservation or political declarations expressing a negative view on a reservation. It was also suggested that the Commission should adopt a broad definition which would facilitate the inclusion of all criticisms that a State might make of a reservation. Moreover, the definition of an objection to a reservation should not rely exclusively on the consequences of an objection as provided for in the 1969 Vienna Convention.

86. It was also stated that the definition of objections to reservations should not prejudge the legal effects of the objections. The intention of both parties should be taken into account in order to determine the treaty relationships, if any, which would exist between the reserving and the objecting States. From that point of view, it was satisfactory that the element of intention had been introduced into the new definition of an objection in draft guideline 2.6.1 because intention was key to determining whether a State's reaction to a reservation amounted to an objection and the incorporation of that notion was consistent with articles 20 to 23 of the Vienna Convention on the Law of Treaties. It was further stated that the Commission should

work on State practice rather than try to codify a definition of objections to reservations.

87. It was also noted that the proposed wording of the definition of objections was based on a single example of State practice. It was therefore doubtful whether it reflected a general rule on objections to reservations. It would be more appropriate to retain the alternative definition proposed by the Special Rapporteur in his eighth report (A/CN.4/535) and revise it later, as necessary. In the same context, it was suggested that the definition of the term "objection" should be drafted in a general manner, so as to cover a broad range of cases corresponding to actual and well-developed practice. It would then be difficult to exclude from the scope of such a definition the intention of objecting States to consider the treaty binding in its entirety on the reserving State. That was the case with regard to objections against reservations incompatible with the object and purpose of a treaty, as set forth in article 19 of the Vienna Convention on the Law of Treaties, which undermined the integrity of the normative provisions of the treaty and the interest of the other States parties in preserving that integrity. Moreover, it was observed that the Commission should focus its work on a thorough examination of those issues, as well as on whether the rules of the Vienna Convention concerning acceptances of and objections to reservations should also apply in the case of impermissible reservations (articles 20 and 21 of the Convention). Only signatory States should be entitled to formulate an objection, since that possibility was closely linked to the obligation of signatory States not to defeat the purpose and object of the treaty before becoming parties to it. The objecting State should repeat its objections at the time of ratification.

88. A view was expressed that only parties to a treaty were entitled to formulate objections to that treaty because reservations and objections thereto created bilateral legal relations between the reserving State and the objecting State, an argument based on the principle that there should be a balance between the rights and obligations of the parties. Furthermore, signatories should not have the right to object to reservations in situations where their overall obligation towards the parties was limited to refraining from acts which would defeat the object and purpose of the treaty; at most, they might be entitled to object to reservations which they considered to be contrary to that object and purpose.

89. With regard to so-called objections with super maximum effect, whereby the State author of the objection sought to paralyse the effects of a reservation, it was observed that recognition of such an effect would inevitably discourage States from participating in some of the most important agreements and treaties. Objections with super maximum effect had no place in international law and were unacceptable because they would constitute the imposition of treaty obligations on a State without its prior consent. It was preferable not to suggest in the definition that an objection could have such an effect; the term "objection" should be defined in the light of established principles of international law, including that of State sovereignty; however, the phrase "exclude or modify the effects of the reservation" allowed for that possibility. The Special Rapporteur could examine this effect in relation to cases when there was a prohibited reservation, whose effects the objecting State or organization should be able to oppose fully and absolutely.

90. Support was expressed by other delegations for widening the definition of the term "objection" to include the "super maximum effect", as reflected in paragraph

293 (e) of the report of the Commission.[8] It was suggested, however, that some flexibility should be built into the definition in accordance with article 21, paragraph 3, of the Vienna Convention on the Law of Treaties. Furthermore, the word "modify" should be excluded from the definition, as it might introduce a new element. Objections by a State only to parts of a reservation should also be covered, and therefore "modify" should be replaced by "all or some of".

91. Concern was expressed about the definition of objections to reservations set out in draft guideline 2.6.1. The Commission appeared to be seeking to broaden the definition provided in the Vienna Conventions on the Law of Treaties. The expression "purports to exclude or modify the effects of the reservation in relations between the author of the reservation and the author of the objection" appeared to be particularly ambiguous, and the arguments advanced in its favour were not convincing. According to the Commission, the proposed definition would not prejudge the validity or invalidity of the objection. However, a reservation always had the same effect; as set out in draft guideline 1.1.1, it purported to exclude or modify the legal effect of certain provisions of a treaty. The incompatibility of a reservation with the object and purpose of the treaty stemmed not only from the effect of the reservation but also from the provision(s) to which it related. Furthermore, the alleged invalidity of a reservation might be challenged by an objection, while the possibility of reacting to an objection, the effects of which might be considered as exceeding the right to object, appeared doubtful. The proposed definition of an objection, specifying exactly its effects, would remove all ambiguity with regard to the admissibility of an objection which might have other effects.

92. It was further stated that a compromise between too broad or too narrow a definition might be one that defined an objection as a reaction purporting to make the effects of the reservation non-opposable in relations between the State author of the objection and the State author of the reservation. Such a definition would be flexible enough to meet the requirements of an "objection with intermediate effect". While not preventing the entry into force of the treaty between the parties, such an objection would render inapplicable between them not only the provision covered by the reservation but other treaty provisions as well. Such an effect would be within the maximum effect permissible under the Vienna Conventions. A State might consider that the reservation affected other treaty provisions and, accordingly, decide not to be bound by those other provisions.

93. According to another view, draft guideline 2.6.1 contained a valid concept of objections. Nevertheless, the central question of the effects of reservations in relation to objections remained unresolved. It was not possible to establish a complete analogy between the nature of reservations and that of objections, and the so-called "intermediate effect" therefore raised doubts, as it might leave a treaty permanently open, a result that would be hard to reconcile with the Vienna Conventions.

94. It was pointed out that the most frequent objection, the minimum effect objection, might not be covered by the definition given in the ninth report of the Special Rapporteur because, in practice, the effects of a minimum effect objection were the same as the effects expected of the reservation.

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[8] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10).

95. In that context an alternative definition was proposed as follows: "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization, whereby the State or organization purports to express an act of non-acceptance (or rejection) of the reservation, certain legal effects being attributable to this act".

96. It was also proposed that the Commission should base its work on the case law of the International Court of Justice, in particular the advisory opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[9] rather than on General Comment No. 24 of the Human Rights Committee, which had claimed for itself the right to decide on the incompatibility of a reservation, with the object and purpose of the International Covenant on Civil and Political Rights and to refuse to accept a reservation.

### 2. Draft guidelines

97. A number of delegations expressed concern about draft guideline 2.1.8 ("Procedure in case of manifestly [impermissible] reservations"), since it allowed the depositary to judge or express a view on the impermissibility of a reservation; while the depositary should remain neutral and impartial in the exercise of his functions in keeping with the provision of article 77 of the 1969 Vienna Convention.

98. With regard to draft guideline 2.4.10 ("Limitation and widening of the scope of a conditional interpretative declaration"), there was no difficulty as far as the limitation aspect was concerned, since the scope of such a declaration could obviously be modified only after agreement had been reached on the binding nature of the treaty. The same did not apply in the case of the widening of an interpretative declaration. It was not clear what would happen to a treaty if the other parties did not all accept the proposed widening. Moreover, a declaration might contain both widening and limiting elements. Widening the scope of such a declaration might therefore be detrimental to the stability of legal relations within the framework of the treaty. Moreover, the formulation whereby the rules on the widening or limitation of a conditional interpretative declaration were explained by reference to draft guideline 2.3.5 ("Widening of the scope of a reservation"), which in turn referred the reader to draft guideline 2.3.1 ("Late formulation of a reservation"), was not entirely successful.

99. Several delegations had doubts regarding the inclusion of the draft guideline on the widening of the scope of reservations as well as on the draft guideline on late reservations; it was not clear how the draft guidelines would really discourage such practices.

100. A view was also expressed that the enlargement of the scope of an existing reservation and the late formulation of a reservation should be considered very exceptional within the law of treaties. There might be legitimate reasons, however, why a State might wish to modify an earlier reservation. Prevailing practice should be taken into account. The risk was reduced by the unanimity reflected in these guidelines. Guideline 2.6.2 ("Objection to the late formulation or widening of the scope of a reservation") was undeniably useful because it cleared up the potential ambiguity of the term "objection" as used in the Guide to Practice, to mean either an objection to the late formulation or widening of the scope of a reservation or an

[9] *I.C.J. Reports 1951*, p. 15.

objection to the reservation itself. It was suggested that the text of guideline 2.6.2 could be included in guideline 2.6.1 ("Definition of objections to reservations").

### 3. "Validity" of reservations

101. Concerning the question on the terminology to be used with regard to reservations (chapter III of the Report of the International Law Commission), several observations were made. It was stated that the Vienna Convention on the Law of Treaties failed to regulate the consequence of a State or an international organization formulating a "prohibited" reservation. Consequently, such a reservation needed to be defined. It was suggested that the terminology to be used should reflect the concern that a reservation should not prejudice the integrity and spirit of the instrument in question. States parties must be the ultimate judges of the admissibility of reservations. Some delegations thought that the adjective "unlawful" was inappropriate to qualify a reservation and should be avoided; although it constituted prohibited conduct, responsibility would not be involved since States could always object to the reservation. But the reserving State might incur responsibility for an internationally wrongful act if it did not observe the provisions of the treaty to which the reservation related. Nor was the term "validity" more relevant because it referred to the reasons for the nullity, which were not necessarily present in a situation where prohibited reservations have been made. In addition, the terms "valid" and "invalid" should not be used to qualify such reservations since they seemed close to the term "nullify" and thus would not have the desired effect of encouraging objections. Emphasis should be placed instead on the scope of effects of a reservation. The word "validity" might lead to the prejudging of the legal consequences of a reservation that allegedly violated the provisions of article 19 of the Vienna Convention although the reservation would be effective unless other States lodged an objection. Moreover, the term "invalidity" could be confused with a case in which a reservation was formulated by an agent not authorized to represent the State for that purpose. The term "admissible" would be more appropriate and would correctly reflect the situation of supervision or monitoring between equal sovereign States. A further problem could be the determination of whether such admissibility could be alleged by the depositary directly or whether it should be alleged by the States under the usual system of individual assessment of reservations.

102. Some delegations were comfortable with the use of the concept of "validity", which was used in articles of the Vienna Convention on the Law of Treaties other than article 19 and, in their view, appeared to be the most appropriate way of addressing the issue.

103. According to another point of view, the terminological question should be seen in relation to the various schools of thought on the legal consequences of "impermissible" reservations. Although such reservations were invalid under international law, thus requiring no objection, experience showed that hardly any State refrained from an objection on those grounds. A State objected to such reservations in order to indicate criticism to the reserving State, which might thus be encouraged to withdraw its reservation. The terms "permissible/impermissible" seemed to enjoy broad acceptance, indicated an objective yardstick and should be therefore adopted. The corresponding French term would be the word "illicite". But it was also suggested that the word permissibility implied that an organ superior to States decided what was or was not compatible with the treaty.

104. It was also stated that the central question when assessing reservations was whether a State should respond with an objection, most crucially in the case of reservations made contrary to the exceptions laid down in article 19, paragraphs (a), (b) and (c) of the Vienna Convention on the Law of Treaties. Cases where a reservation was, in the judgement of another State party, incompatible with the object and purpose of the treaty, left many questions open in the Vienna Convention, especially as to the legal effects of such reservations or the obligation to make an objection to them.

105. It was also suggested that the Commission should consider the term "impermissible reservations" in the light of article 19, paragraphs (a) and (b) of the Vienna Convention on the Law of Treaties, and the term "invalid reservations" in the light of article 19, paragraph (c) of that Convention. The regime described in articles 20 and 21 of the Vienna Convention could apply to reservations under article 19 (c).

106. It was observed that it was important to distinguish between "validity" and "opposability". In international law, a State's assessment of validity was subjective and, therefore, the same reservation might be considered valid by some States and invalid by others. Nullity, which was the penalty for invalidity in domestic law, did not appear to be an appropriate outcome of the invalidity of a reservation in international law.

107. "Opposability", or more precisely "non-opposability", made for a more precise characterization of the penalty for such invalidity, as subjectively assessed. A State which deemed a reservation to be invalid could declare its effects non-opposable to that State. It was also suggested the use of the terms "effectiveness" or "legal effectiveness" in that context might be useful. If, on the other hand, the reservation was clearly prohibited by the treaty, it would be reasonable to consider it null and void by virtue of its nature and therefore "invalid". Such a reservation would therefore not produce the result intended by the reserving State and the treaty as a whole would continue to bind that State. The existing treaty relationship between the reserving State and other States parties would not be affected in any manner whatsoever and the reserving State should not be able to invoke the reservation in its treaty relationship with other States parties. A reserving State could not act in accordance with a normative rule towards one State while acting contrary to it vis-à-vis another. In such cases, the terms "valid/invalid" seemed more appropriate.

108. It was stated that there was no need to distinguish between cases in which a reservation contrary to article 19 constituted an essential condition of consent for the State that had formulated it and other cases. A State could not argue that a reservation contrary to article 19, formulated at the time the State had consented to be bound by the treaty, had been an essential condition of consent and that, therefore, it did not consider itself bound by the treaty. However, if the Commission thought it useful to make such a distinction it should, in order to avoid abuses, elaborate very precise guidelines on what constituted an "essential condition of consent" and how it could be attributed to a reservation. Since the contractual character of treaties and the voluntary nature of treaty commitments constituted a fundamental basis for treaty relations, any rule which would result in allowing a State to be bound against its will by any treaty provision should not be recognized.

109. It was also pointed out that there must be limits to unilateral definitions of the obligations resulting from a treaty; a State by becoming a party to a treaty was

bound to abide by the core obligations of the treaty, reflecting its object and purpose; the principle *favor contractus* required that any declaration incompatible with the treaty must be regarded as invalid; a State making an impermissible reservation should not be allowed to benefit from a breach of article 19 of the Vienna Convention. If States were allowed to make any reservations they wanted to a treaty under pretext of sovereignty, they could divest it of any substance and it would be very difficult to identify the rights and obligations between two States parties resulting from a multilateral treaty.

110. It was observed that the only remedy of a State party to an impermissible reservation would consist of a qualified objection to the reservation precluding the entry into force of the treaty as between the objecting State and the reserving State. However, that solution would work only for synallagmatic treaties and not for treaties establishing *erga omnes* obligations; in the case of human rights or similar treaties, it would create undesirable results. Some multilateral treaty obligations could not be divided into reciprocal and bilateral obligations since they required States parties to act in accordance with normative rules, such as those relating to human rights, disarmament and the environment. If an objecting State refused to enter into a treaty relationship with a reserving State, it would not prevent the reserving State from becoming a party to the treaty and benefiting from its reservation. It would only have the effect of making it impossible for the objecting State to invoke the responsibility of the reserving State for breaches of the treaty, so that it might for that reason decide to refrain from objecting. As a result, any State would be in position to formulate a reservation incompatible with the object and purpose of the treaty without risking an objection, and article 19 of the Vienna Convention would become devoid of substance.

111. Moreover, it was stated that recent practice had shown that it was not always possible to determine from the outset whether a reservation was incompatible with the object and purpose of a treaty. In such cases, States parties should enter into a dialogue with the reserving State in order to clarify the scope of the reservations. The only possible reaction to inadmissible reservations was to regard them as illegal and null and void.

112. It was also pointed out that the provisions of article 2, paragraph 1 (d), and article 23, paragraph 1, of the Convention on the timing and form of a reservation could also be considered conditions of validity. More generally, a reservation should be considered void if it conflicted with a peremptory norm of general international law pursuant to article 53 of the Convention, or if there was a defect in consent pursuant to articles 46 to 52, applied mutatis mutandis. Without elaborating an entire regime on the nullity of reservations, the Commission could mention the problem in its guidelines.

## E. Fragmentation of international law: difficulties arising from the diversification and expansion of international law

### 1. General comments

113. The Commission was commended for its decision to conduct five studies on the topic and delegations welcomed the progress that the Study Group had thus far made. The consideration of the topic by the Commission was timely and it was the ideal body to consider the various studies, despite the theoretical underpinnings of

the topic. Such consideration would serve to enhance the effectiveness of international law.

114. While there was support for the inclusion of the topic in the Commission's current programme of work, the Commission was urged to proceed with caution and to study both the positive and negative aspects of fragmentation. The importance of focusing on substantive rather than institutional aspects of fragmentation on the basis of State practice and judicial decisions was underscored.

115. Although the work of the Study Group had been highly theoretical in nature, some delegations stressed that the outcome should be of practical use to States. Some other delegations were particularly encouraged by the innovative manner in which the Study Group was dealing with the topic and looked forward to further results not only for their substantive importance but also for inspiration as a possible example of how the Commission could proceed in future with other suitable topics. It was suggested that the Commission's work need not be limited to the traditional preparation of draft articles but could also explore new avenues and working methods that would advance the development of international law.

116. Some delegations stated that fragmentation of international law was one of the realities of current international relations, a natural consequence of the expansion of international law and a sign of its vitality. The willingness of States to subject their bilateral and multilateral relations to an international legal framework, on the one hand, strengthened international law, yet on the other hand, contributed to an increased potential for conflict of norms and legal regimes. Since the number of bilateral and multilateral treaties in various fields had increased dramatically in recent years, it was becoming more difficult to maintain coherence among the different legal regimes. To avoid conflict during the treaty-making process and in interpretation, it was therefore essential for practitioners to have a clear understanding of the potential impact of rules of international law on each other. Thus, the topic offered an opportunity for reflection and support was expressed for the current direction of work on the topic and work on the various five studies would help in identifying existing structures and procedures for dealing with conflicts of norms.

117. In that connection, it was pointed out that practical guidelines on how to deal with conflicts arising from fragmentation were needed for States. On the other hand, it was observed that the reports on the studies were still general in nature, and it appeared that guidelines derived from them could be applied to broad areas of international law. Thus, the Study Group was urged to guard against extrapolating guiding principles from few specific case-situations or areas. It was suggested that one possibility was to limit the scope of any guidelines with a savings clause that would state that the guidelines were without prejudice to the possible development of other laws and agreements on related subjects. It was also suggested that consideration could be given to the possibility of amending the relevant provisions of the Vienna Convention on the Law of Treaties or adopting a resolution interpreting such provisions.

118. It was also noted that while the topic was interesting, it was particularly broad and theoretical and did not lend itself to the development of draft articles or draft guidelines. As such, a more useful product might be an expository study that would be informative on possible approaches for dealing with issues involved. Support was also expressed for the Study Group's wish to develop a substantive collective

document as the outcome of its work. While looking forward to seeing how the work on the topic develops in the future, some other delegations reserved their position regarding the outcome and whether it was possible to draw general conclusions on such a broad subject matter.

119. The Study Group was encouraged to ensure that the benefits of its analysis should be easily accessible to States, and that it should begin by submitting certain specific proposals that might offer practical guidance. The Commission was also invited to give States an early opportunity to participate in the discussion of the final outcome in an interactive framework within the context of the Sixth Committee, or other setting such as a panel discussion or seminar; which some delegations indicated an interest in assisting in its organization.

120. In view of the academic orientation of the topic, some other delegations continued to express doubts concerning the advisability of its consideration in the Commission. Such reservations were not dispelled by the theoretical and doctrinal interest engendered by some of the studies and outlines prepared by the Study Group. It was also noted that even some members of the Study Group expressed doubts about whether undertaking normative work in the area was feasible.

### 2. Comments on the study concerning the function and scope of the *lex specialis* rule and the question of "self-contained" regimes and on outlines concerning the various remaining studies

121. Delegations expressed appreciation for the efforts of the Study Group and its chairman, pointing out that the comprehensive study by the Chairman of the Study Group highlighted the complexity and difficulty of the topic and that it assisted in clarifying certain practical questions. Delegations welcomed the fact that a supplementary study would be prepared on regional regimes and regionalism. Moreover, it was suggested that the relationship between the *lex specialis* and the *lex posterior*, including the relevant date of application of the *lex posterior*, needed further study. It was also pointed out that the hypothesis concerning the failure of "self-contained" regimes merited further in-depth consideration.

122. While the *lex specialis* rule appeared to function effectively as an interpretative device and a rule of conflict resolution, it was acknowledged that it was in the area of "self-contained" regimes that the potential for fragmentation was most acute. Some delegations shared the view of the Study Group that the term "self-contained" regime was a misnomer, insofar as it was taken to mean that a special regime was totally isolated from general international law. Indeed, the point was made that none of the existing treaty regimes, including the international human rights treaties and the rules of the World Trade Organization, could be termed autonomous in the sense of excluding the application of general international law. The conclusion that general international law functioned in an omnipresent manner behind special rules and regimes, and that no special rules could be isolated from general international law was considered significant, because it established that the emergence of special treaty regimes in such areas as trade, human rights and the environment did not mean that the international legal regime was losing coherence and was in crisis.

123. On the other hand, it was stated that among the three senses in which the term "self-contained" regime was employed, the category concerning functional specialization, such as human rights law, World Trade Organization law ("WTO

law") and humanitarian law, needed further refinement and analysis in order to decipher the extent and implications of "containment". In that connection, it was contended that some areas of functional specialization, such as human rights law, or the law of the sea, were only loosely self-contained. Although they had their own principles, institutions and teleology, those principles and rules were widely referred to and applied in different forums. In contrast, there seemed to exist "closed" self-contained regimes, such as WTO law, which sought to maintain a monopoly over the interpretation and application of their law and purported to exclude recourse to other forums. Another example was international criminal law, which might over time become more self-contained in that sense. While it was true that general international law provided a normative background for WTO law, its precise role within that self-contained system was not clear. Difficult questions had arisen about whether the principles of general international law supplemented or modified the obligations set out in the WTO agreements.

124. It was averred that the latter situation was more complex, whereby the rules of the "self-contained" regime had developed sui generis and not from a broad international law base. Human rights law was grounded in a public international law tradition, and the links between general international law and human rights law were many. WTO law, on the other hand, had developed from a treaty regime that had operated generally in isolation from public international law, and some of its practitioners had denied any link at all to it. The Study Group was therefore challenged to explore further the possible existence of a functioning "closed" "self-contained" regime.

125. With regard to the outline concerning the "Interpretation of treaties in the light of 'any relevant rules of international law applicable in relations between the parties' (article 31, paragraph 3 (c), of the Vienna Convention of the Law of Treaties), in the context of general developments in international law and concerns of the international community," it was asserted that "relevant rules" referred both to treaty rules and to rules of general international law. Support was therefore expressed for the Study Group's suggestion that further attention be given to how customary law and other relevant rules were to be applied.

126. Concerning the outline on "Hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations, as conflict rules", some delegations concurred in the view that hierarchy of rules in international law did not, on the whole, result in its fragmentation but, on the contrary, constituted an integral part of its strength and unity. Clearly, there was no formal hierarchy, as in the case of national law, but there were undoubtedly generally recognized peremptory principles and rules that constituted the basic structure of international law and were endowed with particular authority and legal force. Along with such *jus cogens* principles and rules, there existed "sectoral" principles of international law whose scope was essentially restricted to specific areas of regulation.

## F. Diplomatic protection (clean hands doctrine)*

127. Some delegations asserted that the State of nationality could not be deprived of its right to exercise diplomatic protection when the charges against its national were unrelated to the claim for which it was seeking diplomatic protection. It was also pointed out that the clean hands doctrine concerning the conduct of a national did not constitute an additional condition or requirement for the exercise of diplomatic protection. The concurrent guilt of the victim of the wrongful act should be taken into account in determining the scope of the reparation.

128. Some other delegations observed that the doctrine of clean hands could be invoked against a State exercising such protection solely in respect of that State's acts which were inconsistent with its obligations under international law, but not in respect of misconduct by a national of that State. In that connection, support was expressed for the conclusions of the Special Rapporteur contained in his Sixth Report (A/CN.4/546) that there was no clear and sufficient authority which would justify the inclusion of a provision in the draft articles on the doctrine. It was also asserted that the doctrine was imprecise and not fully accepted in international law and not recognized by all States, and therefore special treatment should not be given to the subject.

## G. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary hazardous activities)

[For draft articles, see A/CN.4/549/Add.1.]

## H. Other decisions and conclusions of the Commission

129. Several delegations commented on the working method of the Commission and its long-term programme.

130. With regard to the working method of the Commission, some delegations expressed the view that the Commission should continue to seek ways to make its sessions as productive and efficient as possible. Consequently, it was crucial that the work of the Special Rapporteurs should make good progress. In that respect, the Commission's Planning Group should not only examine future topics and parts of the Commission's working routines, but also present its vision of how the Commission should function in future, since it could produce documents of immense importance to international law and order. In that context, a comment was made that the evolution of the Commission's programme of work gave rise to concern, for it contained five topics on which unequal progress had been made, although the Commission might have been expected to achieve significant advances in the 10 weeks of its annual session. If a decision was taken to expand the programme of work of the Commission, it would be necessary to establish priorities, especially in the light of the Commission's proposed future work on the topics in question; the Commission should in fact give emphasis to those topics which might

* For draft articles, see A/CN.4/549/Add.1.

lead to some form of codification or the adoption of useful guidelines for the interpretation of the conduct of States.

131. With regard to the Commission's long-term programme of work, several delegations favoured the inclusion of the issue of international disaster response law as a possible topic for study, and wondered what the international community's alternatives were in the context of the relevant international law. It stated that the Commission should focus on topics whose codification and development would contribute to the needs of the international community, using its broad competence and experience in matters of general international law. In that respect, they appreciated the practice of cooperation with associations of jurists involved in the codification and development of international law, and encouraged further cooperation of that nature.

132. A number of delegations supported the inclusions of two new topics, "Effects of armed conflicts on treaties" and "Expulsion of aliens" on the current work plan of the Commission. Some other delegations would have preferred more explanation by the Commission as to the reasons for their inclusion at this time. A view was also expressed that the topic of "Expulsion of aliens" should rather be taken up by other bodies within the United Nations system, such as the Office of the United Nations High Commissioner for Refugees or the Commission on Human Rights.

133. With regard to the inclusion of the topic *aut dedere aut judicare*, some delegations supported its inclusion in the Commission's long-term programme of work. In their view the topic should identify two areas of interest: the relationship between *aut dedere aut judicare* obligations and human rights obligations, and the way in which the traditional perception of the *aut dedere aut judicare* rule should be considered in the light of modern concepts of universal jurisdiction.

134. Support was also expressed with regard to paragraph 367 of the report of the Commission[8] regarding the summary records of the Commission.